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IN THE

SUPREME COURT OF THE UNITED STATES

No. 612

PAUL KAISER, *Individually and as Representative of* INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL 295 *and* R. L. WEBB, *Individually and as Representative of* INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS ..... *Petitioners*

v.

PRICE-FEWELL, INC. ..... *Respondent*

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The memorandum opinion of the Chancellor is unreported but is contained at page 19 of the certified transcript. The opinion of the Supreme Court of Arkansas is reported in The Law Reporter, Vol. 235, No. 5, dated June 4, 1962, 359 S.W. 2d 449.

JURISDICTION

The judgment of the Supreme Court of Arkansas, Court of last resort of the State, was rendered June 4, 1962. A Petition for rehearing was denied on September 10, 1962. The jurisdiction of this Court is invoked under 28 U.S.C.A. 1257(3).

QUESTIONS SUBMITTED

Petitioners set out the questions submitted as follows:

> May a State enjoin peaceful picketing under a State Labor Policy which is in conflict with the National Labor Policy?
>
> Is the supremacy of Federal Law over conflicting State Law dependent upon proof of the amount of interstate commerce involved?

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment 14 to the Constitution of the United States, Article 6, Clause 2 of the Constitution of the United States, and Amendment No. 34 of the Constitution of the State of Arkansas.

STATUTES INVOLVED

The Arkansas statutory provisions involved are set forth in Section 81-203, *et seq.*, Arkansas Statutes of 1947 Annotated.

STATEMENT

This litigation resulted from an attempt by Local Union 295 International Brotherhood of Electrical Workers, AFL-CIO, to organize the employees of Respondent and to execute a collective bargaining agreement with

respect to such employees. Bargaining conferences were held between the parties but an impasse was reached when respondent refused to accept an exclusive referral system pertaining to employees contained in an area contract presented by the Union. The area contract was identical to a contract which the Union had in effect with the Little Rock Chapter of the National Electrical Contractors Association. Respondent was not and is not now, a member of such Association.

When Respondent refused to accept the contract, a picket line was established by the Union, the purpose of which was to force Respondent into signing the contract. Respondent filed its complaint in Chancery Court seeking injunctive relief and set forth that the exclusive referral system in the contract was prohibited by Amendment No. 34 of the Constitution of the State of Arkansas (Right to Work Law), and the picketing was therefore designed to force Respondent into committing an unlawful act. A temporary restraining order was issued and thereafter made permanent by the Chancellor on December 5, 1961.

Significantly, at no time during any of the proceedings herein did petitioners claim that the State Court did not have jurisdiction over this matter. Furthermore, on appeal to the Supreme Court of Arkansas petitioners did not raise federal constitutional questions until their petition for rehearing. Consequently, the Trial Court was not given an opportunity to pass on the question of federal jurisdiction and the Supreme Court of Arkansas was not given the opportunity to pass on the constitutional questions now presented.

ARGUMENT

I

THE FEDERAL QUESTIONS WERE NOT RAISED IN NOR PASSED ON BY THE STATE COURT.

If is settled law that when as here, any right, privilege or immunity is set up or claimed under the Constitution as grounds for the granting of a writ of certiorari, the claim must be first asserted in the State Court at the proper time and in the proper manner under the State system of pleading and practice. *Hartford Ls Ins. Co. v. Johnson*, 249 U.S. 490, 63 L. Ed. 722, 39 S. Ct. 336. At no point in the proceedings in the State Courts did petitioners bring such a claim to the Court's attention in a manner adequate to apprize the Court that there was before it a claim founded on Federal law, nor did the Arkansas Court at any point find it necessary to pass upon a Federal question. The first time any constitutional question was raised was in the Petition for rehearing filed with the Supreme Court of Arkansas. It was there asserted that the Supreme Court's decision contravened freedoms granted by Amendments 1 and 14 of the Constitution of the United States and also Article 6, Clause 2, of the Constitution of the United States. This Court held in *Herndon v. Georgia*, 295 U.S. 441, 79 L. Ed. 1520, 55 S. Ct. 794, that it is too late to first assert a federal claim in a petition for rehearing to a State Court.

Reproduced as Appendix "A" to this brief is petitioner's statement of Points to be Relied Upon from their original brief in the Supreme Court of Arkansas, indicating the total absence of any federal claim. Reproduced

as Appendix "B" to this brief is petitioner's answer filed in the Trial Court indicating the total absence of any federal claim raised at that level.

Thus we have a situation where petitioners seek for the first time on appeal to assert federal questions. They assert this matter by claiming that the decision of the Supreme Court of Arkansas contravened the Constitution of the United States. We hasten to point out that the decision of the Supreme Court of Arkansas merely affirmed the decision of the Chancellor and for this reason Petitioners had every opportunity to present these very same constitutional questions to the Supreme Court of Arkansas on appeal. Since they failed to do so, this Court is without jurisdiction to grant a writ of certiorari.

II

THE FEDERAL QUESTIONS PRESENTED HAVE BEEN DECIDED BY THIS COURT ADVERSELY TO PETITIONER'S POSITION.

Prior to the 1959 Amendments to the National Labor Relations Act, a great deal of uncertainty existed with respect to areas in which State Courts could exercise jurisdiction. For many years this question remained undecided and disputed. For example, in 1947 this Court in *Bethlehem Steel Co. v. New York Labor Board*, 330 U.S. 767, 91 L. Ed. 1234, 67 S. Ct. 1026, expressly refrained from deciding the question saying that "the election of the National Labor Relations Board to decline jurisdiction in certain types of cases, for budgetary and other reasons, presents a difficult problem which we do not now decide". In 1957 this Court in *Guss v. Utah Labor Relations Board*, 353 U.S. 1, 1 L. Ed. 2d 601, 77

S. Ct. 398 held that the NLRA completely displaced State power even in cases which the Board had declined, and there recognized the ramifications of its holdings. The Court suggested that the solution lay within the halls of Congress.

In 1959 the NLRA was amended by Congress and Section 14(c)(2) of the Act now expressly authorizes states to act in cases where jurisdiction is not assumed by the Board. Section 14(c)(2) reads as follows:

> "(2) Nothing in this Act shall be deemed to prevent or bar any agency or the courts of any State or Territory (including the Commonwealth of Puerto Rico, Guam, and the Virgin Islands), from assuming and asserting jurisdiction over labor disputes over which the Board declines, pursuant to a paragraph (1) of this subsection, to assert jurisdiction."

The issue of federal jurisdiction was not raised in this case in the Trial Court nor was it raised on appeal. No determination has been made as to whether the activities of respondent even "affect" interstate commerce. Since the jurisdictional question was not raised, the prior decisions of this Court are clear that the State Courts are free to act in accordance with State labor policies.

CONCLUSION

The decision of the Supreme Court of Arkansas is correct and the federal questions presented were not raised in nor passed on by the State Courts. The petition for a writ of certiorari should, therefore, be denied.

Respectfully submitted,

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December, 1962.

APPENDIX "A"

POINTS TO BE RELIED UPON

I

THE REFERRAL PROCEDURE DOES NOT CONFLICT WITH AMENDMENT 34.

II

THE COURT ERRED IN APPLYING THE DECISION OF SELF v. TAYLOR TO THE CASE AT BAR.

III

THE COURT ERRED IN HOLDING THAT THE PICKET LINE WAS NOT IN PURSUANCE OF THE STRIKE.

APPENDIX "B"

1.

Defendants Admit the Allegations in Paragraph 1 of the Plaintiff's Complaint.

2.

Defendants admit that Paul Kyzer is an officer and authorized representative of International Brotherhood of Electrical Workers, Local 295, a voluntary unincorporated labor organization with offices in Little Rock, Arkansas. The defendants further admit that R. L. Webb is the International Representative of the International Brotherhood of Electrical Workers, a voluntary unincorporated labor organization with headquarters in Washington, D. C. Defendant R. L. Webb denies that this court has jurisdiction over the International Brotherhood of Electrical Workers and that the International Brotherhood of Electrical Workers is properly a party thereto.

3.

Defendant R. L. Webb denies that neither he nor the International Brotherhood of Electrical Workers committed any of the acts alleged in the said complaint.

4.

Defendant Paul Kyzer admits that Local 295 of the International Brotherhood of Electrical Workers has placed pickets on the work being done by plaintiff at the Rose City Shopping Center in North Little Rock, Arkansas; denies that said pickets were wrongfully placed upon said job, but states that said pickets were placed upon

said job in the furtherance of a legal and proper strike of the employees of the plaintiffs and in furtherance of the constitutional right of said employees to inform the public of their labor dispute with said Price-Fewell, Inc. Defendants state that said pickets were peaceful and legal and that said picketing was for the purpose of informing the public that said plaintiff would not recognize the expressed desire of a majority of the employees of said plaintiff that Local 295 I. B. E. W. be recognized as the bargaining agent for said union employees.

5.

Defendants state that the pickets bore signs informing the public that the electric contractor on the particular job was unfair to members of Local Union 295 of I. B. E. W. The said sign specifically stated "this picket is not for a 'closed shop or a union shop'." Defendants deny the allegations of paragraph 4 of the plaintiff's Complaint and deny that said pickets were for any unlawful purpose or for the purpose of compelling the plaintiff to employ certain members of the union; that the plaintiff had previously recognized that a majority of its employees had authorized local 295 to represent them as their bargaining agent for the purpose of executing a contract with the plaintiff specifying wages and working conditions and that the plaintiff in the midst of negotiations for such contract refused to negotiate further and declined to execute a contract or working agreement asserting that its association with third parties prevented its execution of said working agreement. Defendants state that at no time was the plaintiff asked or urged to

employ any members of the union but that a majority of its employees were affiliated with Local 295, I. B. E. W. which fact was recognized by the plaintiff.

6.

The defendants deny the allegations in paragraph 5 of the plaintiff's complaint.